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IWS briefing, Summer 2003 Volume 3 Issue 2

Abstract

[Excerpt] A newsletter on workplace issues and research from the School of Industrial and Labor Relations at Cornell University.

Keywords

ILR, Institute for Workplace Studies, IWS, labor, market, employee, managers, Jay Waks, ADR, employer, Milton Konvitz, Nellie Brown, worker behavior, MPS program

Comments

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Institute for Workplace Studies

A newsletter on workplace issues and research from the School of Industrial and Labor Relations at Cornell University

CORNELL

Employers Adopting Workplace ADR

DISPUTE RESOLUTION IN THE WORKPLACE is here to stay. It used to be that employees who suffered harassment or discrimination took their cases to court or a government agency. Employees who had beefs with their supervisors were fired or quit, fumed silently, grumbled to colleagues, or found formal or informal channels for processing their grievances. But legislative changes and a spate of court rulings since 1991 have made alternative dispute resolution (ADR) an increasingly common feature of workplace governance.

This extrajudicial means of resolving work-related conflicts provides employers and employees with a private problem-solving forum that is a judicially sanctioned substitute for court or administrative adjudication. "ADR is at the heart of productive problem solving in the employment relationship," says Jay Waks (ILR '68, Law '71), a litigation partner and chair of the employment and labor law practice at Kaye Scholer LLP. Mr. Waks argued the case for ADR at a recent Workplace Colloquium Series Becraft Lecture, sponsored by the *Institute for Workplace Studies* at ILR.

Combining elements of mediation and/or arbitration, ADR is touted as a boon to employers and employees alike. The Supreme Court endorses arbitration as an alternative to litigation, even in cases involving employees' statutory rights, because of its relative speed, lower cost, and broader availability than court. ADR minimizes the litigation-related disruptions and distractions that hurt organizational morale and productivity. Moreover, the confidential and nonpublic nature of the proceedings preserve and protect parties' privacy and public image. This latter feature is especially beneficial to employers. "Adverse publicity arising from workplace bias claims, even when proven false," Mr. Waks says, "translates into lost sales and tarnished reputations for countless years."

By contrast, going to trial is an expensive and high risk proposition. Although most job-related lawsuits are dismissed or settled out of court, many drag on for months, if not years, while expenses for all parties can climb into the hundreds of thousands of dollars. Moreover, the odds at trial are asymmetrical. Defendant employers typically prevail, which hinders most employees' ability to secure legal counsel and leaves them emotionally and financially drained, even when they do find a willing attorney. For the small number of employees whose cases are not summarily dismissed and ultimately are won at trial, the verdict may be sweet indeed: the median dollar award is six times that of other civil trials, Mr. Waks notes, while punitive damages are awarded four times as often. The imbalance between inputs and likely returns deters all but the most intrepid.

Plaintiffs' attorneys and other critics of ADR insist employees are not well served by the process even though their chances are better in arbitration than in court. Their biggest objection centers on the mandatory and binding na-

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Workplace Series Honors Konvitz

Under the thematic banner of workplace and social policy issues, the *Institute for Workplace Studies*' upcoming Workplace Colloquium Series will honor ILR Professor Emeritus Milton Konvitz. The series will feature speakers who personify the cross-disciplinary approach to scholarship and practice that Prof. Konvitz displayed during his 29-year tenure at Cornell.

For the 2003-2004 season, *IWS* will draw presenters from the wider Cornell community. Former Cornell president Hunter Rawlings, who joined the classics and history departments on July 1, and Harold Levy (ILR '74), former New York City Schools Chancellor and past student of Prof. Konvitz, will each lead a session. Also on the roster is Sheryl WuDunn (A&S '81), a Cornell trustee and Pulitzer Prize-winning journalist. Additional speakers will be announced shortly.

Prof. Konvitz is one of the ILR School's founding faculty. He earned a J.D. from New York University Law School and a Ph.D. in philosophy from Cornell, and is an expert on the Bill of Rights. During his years at Cornell, Prof. Konvitz taught a course on American ideals that attracted some 8,000 students. He retired from Cornell in 1975.

The colloquium series is designed to bring together academics, practitioners, policy makers, and students for an informal exchange of ideas and observations. The sessions are open to friends of ILR and Cornell. A brochure with details about dates, times, and topics will be available later this summer; the schedule will also be posted at www.ilr.cornell.edu/iws. For more information, contact Katie Briggs at kb42@cornell.edu or (212)340-7931.

Students and Faculty Focus on Risky Behavior

Editor's note: The article below and accompanying sidebar is the first in a continuing series that will highlight the correlation between the work of ILR Extension faculty and the research projects of students in ILR's Master of Professional Studies (MPS) program in New York City.

THE WORKERS' BEHAVIOR was peculiar: they had received all the appropriate training and had access to all the necessary equipment, but nonetheless worked in unsafe ways. They refused to don respirators in the paint area. They did not follow lock-out/tag-out procedures. They broke safety guards off their machines. They picked up orders from high shelves without using harnesses.

Janet Ortiz, the human resources manager for the two lighting manufacturing plants in question, wanted to understand the phenomenon. "Why were they exposing themselves to unnecessary physical risk?" she asked. She looked at existing studies about risky behavior in the workplace and realized that little research had been done from the employee perspective. To fill that hole – and find an answer that would lead to safer workplaces – Ms. Ortiz drew on the theories, research methodology, and analytic tools she had studied during her two-year MPS program.

Archival research, employee interviews, and observation led Ms. Ortiz to the conclusion that the underlying reasons for what was essentially similar behavior differed for each of the plants. In the first, a production-oriented ideology created a norm that stressed the importance of meeting production goals. In the second, the risk-taking, right-of-passage attitude and behaviors of two specialized occupational groups spilled over into the rest of the plant. Ms. Ortiz validated her results by asking workers to comment on the study. "For the most part, I was right on," she says.

With an explanation in hand, Ms. Ortiz devised a plan she hoped would change the noncompliant culture regarding safety. She determined that a management-driven initiative would fail, so pushed responsibility down to the hourly level. Natural leaders, who played formal or informal leadership roles at the plants, were identified. They were trained in safety procedures and in communication and presentation skills, and given authority to call meetings and organize training sessions for their peers.

The results were quickly apparent. Workers are now conforming to safety expectations; they are wearing protective equipment and working in a safe manner. Ms. Ortiz attributes the success of the program to its grass-roots structure. "The leaders are held responsible, so they want it to go right," she says.

Workplace ADR

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ture of predispute arbitration agreements, which require employees to accept ADR and waive their right to a jury trial even before a dispute arises and often as a condition of employment. Plaintiffs' attorneys have challenged the legality of these clauses in court. The persistence of their attacks has prompted some employers to consider a simpler jury trial waiver which would result in a non-jury bench trial for statutory cases that otherwise would be decided in arbitration. Critiques aside, the courts seem willing to enforce ADR agreements if several conditions are

met. Acceptable programs, Mr. Waks explains, must be "understandable, fundamentally fair, binding on the employer, and provide full legal remedies, especially in statutory discrimination cases."

The design of an ADR system is critical. Mr. Waks cautions that no one model suits every workplace, but says the best systems have four basic attributes: they fit the culture; they leverage existing problem-solving processes; they allow business units to devise their own "first step" into the process; and they don't create unnecessary bureaucracy. He further says model programs contain at least three

...Workplace Culture and Safety

Organizational culture is a powerful force. Just talk to Nellie Brown, senior Extension associate at ILR Extension's Great Lakes Region, who investigates workplace health and safety practices in the field. After years of observing and consulting, Ms. Brown is convinced that cultural norms propel workers toward risky behavior.

Corroborating what Ms. Ortiz discovered, Ms. Brown says production incentives can induce workers to take shortcuts, do more work in less time, and push beyond their limits. The risk is not always apparent, and when workers don't immediately see or feel the negative effects of their actions, Ms. Brown notes, they may be less likely to proceed in a safe manner.

Moreover, some plants lack a history of health and safety enforcement. Appropriate work rules may be in place, she says, but workers may follow their own regimes knowing no one will check. Habits form, which are hard to change, and when people get into a groove, they may be less attentive. That's when accidents happen.

Poor job or workstation design also contributes to health and safety problems. Companies may train employees to move or lift in safe ways, Ms. Brown says, but sometimes the set up or required speed makes it impossible to perform the task properly.

But culture can be changed. Ms. Brown's suggestions: engage workers in job-specific hazard and risk analyses; align production goals with safe practices; enforce standards. Contact Ms. Brown at njb7@cornell.edu or (716)852-4191 for more information.

basic steps: an initial complaint resolution process that is fast and fair; mandatory mediation, where parties jointly try to resolve the problem with the help of a third-party neutral; and binding arbitration, where the conflict is finally decided by an outside, experienced neutral.

A staunch advocate of arbitration, Mr. Waks nonetheless asserts that problems should be resolved well before they reach this stage. "Mediation is where all the important action should be," he says, which leaves arbitration to play something of a persuasive role. Mr.

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Labor Standards and Labor Law Reform: A Global View

THE IMPACT OF GLOBALIZATION on the workplace can hardly be overstated. As goods, capital, and services increasingly flow across national borders, long-standing institutional structures and ways of doing business are losing their viability. Human resources management, labor market dynamics, labor laws, and collective bargaining arrangements are in flux throughout the world. Several ILR faculty members, keenly aware of these shifts, are pursuing research and outreach agendas with an international focus.

Collective bargaining professors Sarosh Kuruvilla and Maria Cook are representative of the emphasis ILR places on understanding of, and engagement with, the realities of globalization. Prof. Kuruvilla focuses his attention on workplace and labor force issues in Third World economies, while Prof. Cook investigates the link between politics and labor in Latin America.

One issue that concerns Prof. Kuruvilla is labor standards in developing economies. In recent years, students, union activists, and many consumers have denounced the brutal working conditions often found in Third World factories that produce clothing and footwear under contract to iconic American brands. Several companies have responded to the uproar by agreeing to hold their subcontractors responsible for meeting certain codes of conduct. Monitors are typically sent into the factories to ensure compliance.

Although the intentions may be laudable, Prof. Kuruvilla says there are problems with this arrangement. First is the lack of uniformity in standards, which are set by multiple organizations. "There are philosophical and practical differences across companies and associations," he notes. Second is lack of agreement among all parties about how monitoring should be carried out. And finally, there are no commonly accepted criteria for training on-site investigators.

Prof. Kuruvilla and colleague Lance Compa have a plan that would build on ILR's workplace expertise to strengthen and improve monitoring efforts. If seed money can be found and stakeholder endorsements obtained, professors Kuruvilla and Compa

hope to offer a multi-week training course for current and prospective monitors that would culminate in certification. The goal is to make this the training program of choice for the industry, a development that would inevitably result in rigorous and consistent standards on the factory floor and in enforcement efforts. Prof. Kuruvilla says the Cornell affiliation will be a mark of high quality.

A different set of issues pulls at Prof. Cook, who earned her Ph.D. in political science. She is presently engaged in a comparative study of labor law reform in six Latin American countries where employers are pressing for legislative changes they contend will help cut labor costs and make locally produced goods more competitive in international markets. Prof. Cook's research describes and analyzes the debates raging in Argentina, Bolivia, Brazil, Chile, Mexico, and Peru as these economies open up to the forces of globalization.

Flexibility in managing the workforce is employers' stated goal. Claiming the need to hire and fire without incurring financial penalties, employers want to eliminate the principle of job stability, which is embedded in national labor laws. In some cases, they are also supporting efforts to undermine collective bargaining and curb workers' right to strike.

Prof. Cook questions the public rationale used to justify the reforms. First, legal modifications may not be necessary to achieve flexibility and cost savings. Although some workers enjoy the guarantee and related benefits of indefinite employment contracts, Prof. Cook says many more work in the

informal sector and have no contract at all. She also remains unconvinced that labor costs are out of line. Indeed, Prof. Cook suggests that calls for flexible labor laws by employers and their government allies may be a politically acceptable cover for the core objective: weakening trade unions.

How the reform debate plays out in each country ultimately depends on the underlying political dynamic, Prof. Cook says. And that, in turn, seems to hinge on the sequential relationship between democratic and economic reforms. In other words, as countries become more democratic, labor rights generally proliferate. But the drive towards open economic systems tends to restrict those very same rights. "Where democracy preceded economic liberalization and unions were part of the political base, as in Argentina," Prof. Cook explains, "labor negotiated relatively favorable deals with the government. Where economic changes occurred first, as in Chile, unions were weaker and less successful at expanding workers' rights."

Contact Prof. Kuruvilla at ck4@cornell.edu or (607)255-6735 and Prof. Cook at mlc13@cornell.edu or (607)255-1349 for more information.

Working with the ILO

ILR recently entered into a cooperative relationship with the International Labor Organization (ILO) thanks to the outreach efforts of Prof. Sarosh Kuruvilla and Catherwood Library's chief research librarian Stuart Basefsky. ILR and the ILO have jointly hosted several conferences, and scholars have undertaken joint research projects. In addition, ILR faculty on study leave may now work out of the ILO's Geneva headquarters and ILO internships for undergraduates are available through a program run by Prof. Cletus Daniel. Stay tuned for more developments.

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Waks says disputants are more likely to reach mutual agreement when they know that mandatory and binding arbitration, with its winner-take-all outcome, is the next step.

The details of this last step can make or break an ADR program. Mr. Waks says an arbitration process can withstand legal challenge and allay employees' anxieties if it includes nine criteria: a clearly written and widely disseminated explanation of the process, the availability of full legal remedies, the opportunity for employees to hire counsel, the right to at least limited discovery for all parties, employee involvement in the choice of arbitrator from among a panel of trained arbitrators, a limit on process-related employee costs, a filing period that parallels applicable statutes of limitation, a written opinion by the arbitrator, and court review of the award in the event of "manifest disregard" of facts or law.

But even a model program that ensures employees'

procedural and substantive rights will be considered successful only if employees turn to it by choice. And that, Mr. Waks says, ultimately depends on management. That is, supervisors and human resource professionals must reinforce the advantages of ADR through workplace education and by practical demonstration of their commitment to a fair and effective program.

*Editor's note: For a comprehensive view of conflict management within American corporations, see the new book by ILR professors David Lipsky and Ronald Seeber, co-authored with Richard Fincher: **Emerging Systems of Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals** (2003. San Francisco: Jossey-Bass. 432 pgs. \$49.00). ■*

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